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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITIES OF CHANUTE, AUBURN, GARNETT, HUMBOLDT, IOLA, NEODESHA, OSAGE CITY, KANSAS AND CLEVELAND, OKLAHOMA
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December 7, 1994

QUESTION PRESENTED

Whether Plaintiff Cities who substantially prevailed in their request for injunctive relief under the Federal antitrust laws against an interstate pipeline company for refusal to provide transportation services to allow Cities to purchase natural gas from independent producers in competition with the pipeline can be denied reasonable attorney's fees under Section 16 of the Clayton Act, 15 U.S.C. § 26, on the ground that the Cities were unsuccessful in a subsequent damages phase of the case.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITIES OF CHANUTE, AUBURN, GARNETT, HUMBOLDT, IOLA, NEODESHA, OSAGE CITY, KANSAS AND CLEVELAND, OKLAHOMA
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, the Cities of Chanute, Auburn, Garnett, Humboldt, Iola, Neodesha, Osage City, Kansas and the City of Cleveland, Oklahoma respectfully pray that a writ of *certiorari* issue to review the judgment and Opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on August 8, 1994, and a denial of Plaintiffs' petition for rehearing *en banc*, entered September 8, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 31 F.3d 1041 (10th Cir. 1994), and is printed in the appendix hereto, page 1a, *infra*.

JURISDICTION

The Kansas and Oklahoma Cities, Petitioners herein brought this suit under § 2 of the Sherman Act, 15 U.S.C. § 2 and § 16 of the Clayton Act, 16 U.S.C. § 26, in the District Court of Kansas, Wichita requesting injunctive relief and damages. The district court granted a preliminary injunction in Cities' favor on February 5, 1988, reported at 678 F.Supp. 1517 (D. Kan. 1988). On appeal by the Respondent, Williams Natural Gas Company, the Court of Appeals for the Tenth Circuit entered an order on July 26, 1988 approving a Stipulation between the parties which accorded to the Cities permanent rights to 100% transportation on the Respondent's interstate gas pipeline. App. 20a. This ended the injunctive relief phase of Cities' case under § 16 of the Clayton Act. Subsequent proceedings seeking damages were denied on summary judgment by the district court and affirmed by the Court of Appeals for the Tenth Circuit, 955 F.2d 641, 646 (10th Cir.) *cert. denied*, 113 S.Ct. 96 (1992). The Cities' request for attorneys' fees relating to their request for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 was denied by the district court, reported at 820 F.Supp. 1290 (D. Kan. 1993) and affirmed by the Tenth Circuit in the opinion below, 31 F.3d 1041 (10th Cir. 1994), App 1a.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in

> any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable or loss or damage is immediate, a preliminary injunction may issue . . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

STATEMENT OF THE CASE

In this case, the plaintiff Cities initially filed a complaint and sought a preliminary injunction in the District Court of Kansas, pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26, against Williams Natural Gas Company ("WNG") for cutting off the transportation of gas supplies the Cities had contracted for directly from independent producers on August 1, 1988. Section 16 of the Clayton Act authorizes the issuance of a preliminary injunction for any violation of the antitrust laws and expressly authorizes the award of a "reasonable attorney's fee" for a plaintiff that "substantially prevails" in any action therein.

After 10 days of trial hearings, briefs and oral argument, the district court issued a preliminary injunction requiring WNG to provide immediate 100 percent transportation to all Cities under either firm or interruptible transportation. *City of Chanute, et al. v. Williams Natural Gas Co.*, 678 F.Supp. 1517, 1519 (D. Kan. 1988). The court ruled

> Plaintiffs have thus established the likelihood they will prevail on their "essential facility" claim and have raised questions going to the merits "so serious, substantial, difficult and doubtful as to make them a fair ground for litigation." With this determination made,

> plaintiffs have satisfied ~~each~~ of the requirements necessary to obtain a preliminary injunction.

678 F.Supp. at 1534.

The district court, on February 5, 1988, ordered WNG "to open access to its pipeline to the eight plaintiff Cities for the transport of third party gas," ruling that once the Cities' contracts for such gas were finalized, "the Cities will have waived their present contracts with Williams and any rights or claims that may exist under those contracts." 678 F.Supp. at 1534.

WNG filed a notice of appeal of the district court's preliminary injunction to the Court of Appeals for the Tenth Circuit on February 25, 1988, and filed a motion for a stay pending appeal on the merits. WNG claimed a stay was required because it would suffer over $100 million loss if the Cities proceeded. 1 This Court granted a stay, scheduled briefs to be filed on the merits of the case, and set an expedited date for oral argument.

Earlier, on January 4, 1988, WNG had filed a "Revised Stipulation and Agreement" (RS&A) at the Federal Energy Regulatory Commission ("FERC") as its proposal for transport of third party gas under FERC's regulatory Order Nos. 436 and 500. *Williams Nat. Gas Co.*, 43 F.E.R.C. ¶ 61,227 (1988). The RS&A was not agreed to by the eight Cities because it did not provide the Cities with immediate 100% transportation, did not waive the Cities existing contracts, and had provided other restrictions contrary to the preliminary injunction awarded the court, Id., 43 F.E.R.C. at 61,589 (1988).

WNG filed a "Suggestion of Mootness" on July 20, 1988 with the Tenth Circuit, contending that FERC's approval of the RS&A made the district court's preliminary injunction moot.

At the oral argument before the Tenth Circuit on July 22, 1988, the court told the parties they could either agree as to transportation

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1 Later WNG dropped this claim.

arrangements and submit a stipulation to the court for approval or the issue of mootness would be remanded to the district court. Thereupon the parties at the courthouse negotiated an agreement set forth in the Stipulation dated that day, July 22, 1988. This Stipulation was approved by the court on July 26, 1988. App. at 20a.

The terms of the Stipulation of July 22, 1988 defined rights to the Cities which were substantially greater than those contained in the RS&A. The first clause provided as to all eight Cities, whether their sales contracts with WNG were expired or not, that WNG "will provide ... firm and/or interruptible transportation service for 100 percent of their natural gas requirements, in lieu of full requirements or other sales service." App. at 22a ¶ 1. The Cities' undisputed evidence to the district court (at the hearing relating to Cities' claims for attorney's fees) established that the Cities negotiated and entered into the Stipulation of July 22, 1988 only because it provided 100 percent immediate firm or interruptible transportation, greater rights than available to them under the terms of WNG's RS&A at the FERC. [2]

This 100 percent transportation provision in the Stipulation of July 22, 1988 resulted in a saving of over $3.7 million to Cities beyond the most liberal conversion option of the RS&A over the four years of 1988-1992. [3]

The formal order by the Tenth Circuit on July 26, 1988 approving the Stipulation of July 22, 1988 between the parties ended the injunction phase of the Cities' suit under Section 16 of the Clayton Act. Since the Stipulation expressly gave to the Cities new rights on a

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2 Testimony of Robert Walker (City Manager, Chanute, Kan.) at February 8, 1993 hearing. Appellate (Aplt) App. at 130; Affidavit of Rachel Mueller (City Clerk, Humboldt, Kan.), Aplt. App. at 377, 1381-82; Affidavit of Robert Walker, Aplt. App. at 400, 403-04.

3 Testimony of Robert Walker (City Manager, Chanute) at February 8, 1993 hearing, Aplt. App. at 120-21; Affidavit of Edgar Bernstein, Aplt. App. at 412.

permanent basis similar to those contained in the district court's earlier preliminary injunction, and greater than the RS&A, the Cities agreed in the Stipulation that the proceeding then before the Court of Appeals should be dismissed.

The Federal Energy Regulatory Commission subsequently ruled that the Stipulation of July 22, 1988 between WNG and the Cities was a settlement that exempted Cities from take-or-pay charges:

> The Cities have advised WNG that they wish to terminate their sales service agreements and convert to 100% firm or interruptible transportation service. The conversions are not effected under section 284.10 of the regulations. In settlement of an antitrust case brought by some of the Cities (the "Kansas Cities"), WNG and the Kansas Cities entered a stipulation on July 22, 1988, in which they agreed: (1) that unexpired sales contracts are mutually terminated, (2) that WNG would provide firm and/or interruptible transportation service, and (3) that the Kansas Cities would not oppose abandonment of the sales service.
>
> * * * *
>
> We cannot condition the instant authorization on the Cities' having continued obligations for take-or-pay costs. The Cities are not subject to the Commission's jurisdiction and do not require our authority to cease purchases once their contractual obligations have ended. We would be unable to enforce any condition imposed on abandonment after the expiration of the Cities' contractual obligations.

Williams Nat. Gas. Co., 48 F.E.R.C. ¶ 61,057 at pp. 61,293-3, 61,296 (1989), (emphasis added).

Subsequent to the Stipulation of July 22, 1988 approved by the Tenth Circuit by order issued on July 26, 1988 (App. 20a), the Cities sought damages under § 4 of the Clayton Act relating to the narrow

period prior to the Stipulation. This claim of damages was denied on summary judgment by the district court and affirmed by the Tenth Circuit. *City of Chanute, et al. v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S.Ct. 96 (1992). Thereafter Cities sought attorney's fees related solely to their successful resolution of their request for injunctive relief under § 16 of the Clayton Act.

A panel of three judges of the Court of Appeals for the Tenth Circuit below in a decision entered on August 8, 1994, denied the Cities' request for an award of attorney's fees relating to their request for injunctive relief under § 16 of the Clayton Act. App. 1a. The court based its ruling on the novel proposition that no award of attorneys' fees can be made for success in obtaining antitrust injunctive relief under § 16 of the Clayton Act, where a subsequent request for damages under § 4 of the Clayton Act has been denied.

REASONS FOR GRANTING THE WRIT

The Court's Decision Conflicts With The Plain Language Of § 16 Of The Clayton Act And Prior Decisions Of Other Circuits

Once the Cities had obtained permanent relief for the future through the Stipulation of July 22, 1988, approved by order of the Tenth Circuit on July 26, 1988, App. 20a, ending the injunctive relief part of the case, the remaining issues relating to damages under §4 of the Clayton Act were confined to the narrow interim period where WNG had denied transportation. The court below relies on its subsequent decision in the damage phase, in which the Cities were not successful, as a basis for denying an award of attorney's fees for the earlier injunctive relief obtained by the Cities in the Stipulation. In so ruling, the court has made new law that conflicts with the plain language of § 16 of the Clayton Act and prior decisions of the Courts of appeal for the eighth and ninth Circuits.

The language of Section 16 of Clayton Act is clear:

> . . . [A] preliminary injunction [for a violation of the antitrust laws] may issue....In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C.A. §26 (emphasis added). The statute in mandatory language provides that the court "shall award" a reasonable attorney's fee to a plaintiff that substantially prevails in an action for a preliminary injunction. It does not require as a condition precedent that a plaintiff also prevail in an action for damages. As such, the outcome of a damage suit is irrelevant.

City of Malden v. Union Electric Co., 887 F.2d 157, 165 (8th Cir. 1989), and *Southwest Marine, Inc. v. Campbell Industries*, 796 F.2d 291 (9th Cir. 1986), hold that a judgment under Section 4 of the Clayton Act for damages is not a prerequisite to an award of attorney's fees under Section 16. These decisions from the Eighth and Ninth Circuits conflict with the decision of of the Tenth Circuit below.

In *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566 (1992), this Court held that any victory, anything that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff" makes the Plaintiff a prevailing party. In *Farrar*, the plaintiff received a civil rights judgment for $1.00. Despite the fact that this was only a nominal award, the Court held the plaintiff was a prevailing party. "Plaintiff must prove the settling of some dispute 'which affects the behavior of the defendant towards the plaintiff.'" 121 L.Ed.2d at 503, *quoting Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Under the standard set forth in the *Farrar* case, the Cities met the "prevailing party" standard of §1988 of the Civil Rights Act which, *a fortiori* , would meet the mandatory standard of §16 of the Clayton Act.

The issuance of a preliminary injunction by the district court to the Cities requiring the WNG pipeline company to provide 100% transportation to the Cities for competitive supplies of natural gas

purchased from independent producers was confirmed in the Stipulation of July 22, 1988, and approved by order of the Tenth Circuit. App. 20a and 22a ¶ 1. This provided the Cities with the right to permanent 100% transportation on WNG's system -- a right that went substantially beyond the limited transportation available to the Cities under WNG's filings at the FERC. This provided benefits to the Cities of over $3.7 million. The Tenth Circuit below did not deny these clear facts but ruled that the Cities would not be a prevailing party for the injunction proceedings since they were unsuccessful in the later proceedings for damages. This was clearly inconsistent with this Court's decision in *Farrar v. Hobby, supra.*

The same result follows under *Dahlem v. Board of Education of Denver Public Schools*, 901 F.2d 1508 (10th Cir. 1990). In *Dahlem*, the plaintiff sued under the Civil Rights Act, seeking the right to participate on the women's gymnastic team in high school, which had no men's program. The district court awarded a preliminary injunction to Dahlem. The defendant appealed. The case became moot before defendant's appeal could be heard, because Dahlem had graduated. Despite this, the Tenth Circuit held that he was a "prevailing party," and therefore entitled to attorneys' fees, ruling that the prior award of a preliminary injunction constituted relief on the merits. This determination was made without regard to whether the district court's decision on the underlying merits in the preliminary injunction was correct:

> We make this inquiry "without regard to whether we think the district court's decision on the underlying merits was correct." (citing cases).

See 901 F.2d at 1512. In fact, the Tenth Circuit held that plaintiff was a prevailing party, knowing that it had reversed a companion case to *Dahlem*'s on the merits.

The decision of the court below not only conflicts with decisions of the Eighth and Ninth circuits in *City of Malden* and *Southwest Marine, supra*, but improperly seeks to indirectly overrule its own prior precedent in *Dahlem* by relying on a subsequent decision under the limited, different issues in the § 4 damage phase as controlling of the injunctive relief case before the court. Thus, the court below has established a new

principle of law that is inconsistent with the clear mandate of § 16 of the Clayton Act and conflicts with decisions by the Eighth and Ninth Circuits, as well as prior precedents of the Tenth Circuit itself.

CONCLUSION

For the above reasons, the Kanas and Oklahoma Cities, petitioners herein, request that this Court issue a writ of *certiorari* to review the decision of the Court of Appeals for the Tenth Circuit below.

Respectfully submitted,

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December 7, 1994

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; CITY OF OSAGE, KANSAS,	)	
Plaintiffs-Appellants,	)	No. 93-3101 93-3125
v.	)	
WILLIAMS NATURAL GAS COMPANY,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 87-1463-PFK)

Charles F. Wheatley, Jr. (Don Charles Uthus, Peter A. Goldsmith, and Timothy P. Ingram, of Wheatley & Ranquist, Annapolis, Maryland; Larry D. Hendricks and Ronald Greg Wright, of Stumbo, Stumbo, Hanson & Hendricks, Topeka, Kansas; and Robert Pennington, of Henshall, Pennington & Brake, Chanute, Kansas, with him on the briefs), of Wheatley & Ranquist, Annapolis, Maryland, for the Plaintiffs-Appellants.

John T. Schmidt (C. Kevin Morrison, of Conner & Winters, Tulsa, Oklahoma; David Batow, General Counsel, of Williams Natural Gas Company, Tulsa, Oklahoma; William J. Sears, Senior Counsel, of the Williams Companies, Inc., Tulsa, Oklahoma; and Donald W. Bostwick

and Teresa J. James, of Adams, Jones, Robinson & Malone, Wichita, Kansas, with him on the briefs), of Conner & Winters, Tulsa, Oklahoma, for the Defendant-Appellee.

Before ANDERSON and TACHA, Circuit Judges, and ROSZKOWSKI,* District Judge

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* The Honorable Stanley J. Roszkowski, Senior District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

TACHA, Circuit Judge.

Plaintiffs appeal from the district court's denial of their motion for attorneys' fees and costs pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26. See City of Chanute v. Williams Natural Gas Co., 820 F. Supp. 1290 (D. Kan. 1993). We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

This appeal is the latest round in a long string of litigation between plaintiff cities ("the cities") and defendant, Williams Natural Gas Co. ("Williams"). The specific issue we must decide is whether the cities are entitled to attorneys' fees under § 16 of the Clayton Act. Because the results of previous trips by these parties up the litigation ladder are relevant to the attorneys' fee issue, we recount prior litigation as necessary background. 1

The cities purchase natural gas and resell it to customers located in the cities and surrounding areas. Williams owns and operates the only interstate pipeline serving the cities. Originally, each of the cities had a "full requirements" contract with Williams. Such

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1 A more detailed factual history of this case, as well as a history of the natural gas industry, is set out in several district court opinions. See City of Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517 (D. Kan. 1988) (Chanute I); City of Chanute v. Williams Natural Gas Co., 1990-1 Trade Cas. ¶ 68,967, 1990 WL 20019 (D. Kan. Feb. 16, 1990) (Chanute II); City of Chanute v. Williams Natural Gas Co., 743 F. Supp. 1437 (D. Kan. 1990) (Chanute III). In addition, this court has previously recounted some of the background of this case in City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 646 (10th Cir.) (Chanute IV), cert. denied, 113 S. Ct. 96 (1992), but we repeat that background here for convenience. We will refer to these cases by number in the remainder of this opinion. For those of you keeping score at home that would make the district court opinion in this appeal, City of Chanute v. Williams Natural Gas Co., 820 F. Supp. 1290 (D. Kan. 1993), "Chanute V" and this opinion "Chanute VI."

contracts require the cities to purchase all their natural gas from Williams and in return Williams agrees to supply all of the cities' natural gas needs. As a result, all of the natural gas used by the cities was bought from Williams.

In December 1986, however, the landscape began to change. Williams sought Federal Energy Regulatory Commission ("FERC") approval to allow it to transport gas from third-party suppliers - - thereby acting as a common carrier - - on a permanent basis. 2 While awaiting FERC approval, Williams initiated a temporary open access program to transport third-party gas for the cities pursuant to § 311 of the Natural Gas Policy Act, 15 U.S.C. §3371 (1978). The cities began to negotiate and enter into agreements for gas from third-party suppliers who offered gas at lower prices than Williams.

The temporary open access program ran from December 1986 to August 1, 1987. During this period, Williams experienced difficulty paying its third-party suppliers. 3 On August 1, 1987, Williams ended its temporary open access program and largely closed its pipeline to third-party gas. 4 Two days after Williams closed its pipeline, the cities filed suit alleging violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and requesting injunctive relief

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2 Williams sought a transportation tariff pursuant to FERC Order No. 436, 50 Fed. Reg. 42,408 (1985).

3 This difficulty was due to the "take-or-pay" provisions in Williams' contracts with the suppliers. Such provisions obligate a pipeline to pay for certain volumes of gas even if the pipeline is unable to sell that amount to its customers.

4 Some third-party gas remained available under FERC regulation. Williams was still required to transport third-party gas under FERC Order No. 451 which "established procedures for the renegotiation of . . . pre-NGPA gas prices and the release of gas covered by . . . pre-NGPA gas purchase contracts." Chanute I, 678 F. Supp. at 1524-25.

under §16 of the Clayton Act, 15 U.S.C. § 26. On February 5, 1988, the Federal District Court for the District of Kansas granted the cities a preliminary injunction. See Chanute I.

Williams subsequently filed a notice of appeal to this court, and on March 3, 1988, we granted a stay of the preliminary injunction pending full resolution of the appeal. Prior to oral argument on the preliminary injunction, FERC approved Williams' revised stipulation and agreement, or "RS&A," establishing Williams' permanent open access program beginning July 20, 1988. After approval of the RS&A, Williams filed a suggestion of mootness with this court. At oral argument on July 22, 1988, we asked the parties to attempt to reach agreement in light of the RS&A and informed them that, if they could not reach agreement, we would remand the case to the district court for consideration of the mootness issue. The same day, the parties reached agreement and filed a stipulation that provided for a withdrawal of the appeal and a dismissal of the preliminary injunction. We approved the stipulation on July 26, 1988, vacated the preliminary injunction along with our stay order, and dismissed the appeal. There is some disagreement between the parties regarding whether the stipulation provided rights to the cities greater than those they were due as a result of the RS&A and the general open access program. We find it unnecessary to resolve this question for purposes of this appeal.

Because there remained a damages claim by the cities against Williams under § 4 of the Clayton Act, 15 U.S.C. § 15, arising from the period of Williams' reversal of its interim open access program, the case returned to the district court for an adjudication of the merits of the cities' antitrust allegations. The district court granted summary judgment for Williams on all of the cities' claims. See Chanute II; Chanute III. We affirmed the district court's judgment for Williams. See Chanute IV.

Despite the rejection of their antitrust claims on the merits, the cities brought the motion for attorneys' fees under § 16 of the Clayton Act which is now before us. The cities argue both that they are formally "prevailing parties" in light of their success in getting a preliminary injunction against Williams and that at any rate they have

"substantially prevailed" in light of the terms of the stipulation agreement. Rejecting these arguments, on February 18, 1993, the district court denied the cities' motion for attorneys' fees.

On March 19, 1993, the cities filed a notice of appeal with this court that identified the appealing parties as "City of Chanute, Kansas, et al." (appeal No. 93-3101). Recognizing that a notice of appeal so captioned is potentially ineffective as to the seven of the eight plaintiff cities not specifically named, on April 8, 1993, we directed the parties to brief the issue of our jurisdiction to hear the appeals of the seven unnamed cities. Apparently recognizing the potential jurisdiction problem, the cities filed with the district court a motion under Fed. R. App. P. 4(a) (5) for an extension of time to file an amended notice of appeal. On April 15, 1993, the district court granted the cities' motion, giving them ten days to file an amended notice of appeal. The cities filed an amended notice of appeal on April 21, 1993 specifically naming all eight cities involved in the Williams litigation (appeal No. 93-3125). 5 The cities also filed a motion with this court, opposed by Williams, to vacate our order that the parties brief the jurisdictional issue in light of the amended notice of appeal. It is in this posture that the case is now before us.

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5 We have consolidated the appeals numbered 93-3101 (first notice of appeal) and 93-3125 (second notice of appeal) and dispose of both through this opinion.

II. Sufficiency of Plaintiffs' Notice of Appeal 6

As a preliminary matter, Williams continues to maintain that the appeals of the seven cities not specifically named in the original notice of appeal must be dismissed for lack of jurisdiction. Fed. R. App. P. 3(c) directs that a "notice of appeal shall specify the party or parties taking the appeal." 7 In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court made clear that compliance with this rule is indispensable to appellate jurisdiction. Id. at 315-316. The Court also specifically held in Torres that use of the phrase "et al." in a notice of appeal is not sufficient to satisfy Rule 3(c) as to those parties not otherwise specifically named in the notice. Id. at 317-318; see also Dalton Dev. Project v. Unsecured Creditors Comm., 948 F.2d 678, 681-82 (10th Cir. 1991); Laidley v. McClain, 914 F.2d 1386, 1389 (10th Cir. 1990) (holding that "the failure to specifically designate a party somewhere in the notice of appeal is a jurisdictional bar to that party's appeal") (emphasis added). This is exactly the situation with the cities' first notice of appeal. Filing the notice on behalf of "City of Chanute, Kansas, et al." without more is sufficient notice of appeal only as to the City of Chanute, Kansas.

Only if the Cities' second, amended notice of appeal is valid do we have jurisdiction over the appeals of the seven cities not named in the original notice. Fed. R. App. P. 4(a)(1) directs that to be effective, a notice of appeal must be filed within thirty days of the entry of the judgment or order from which the party appeals (the "prescribed period"). It is undisputed that the cities' amended notice of appeal was not filed within the prescribed period (the judgment appealed from was entered on February 18, 1993, and the amended notice of appeal was not filed until April 21, 1993). Therefore the

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6 We do not find it necessary to rule on the cities' motion to vacate our order to brief the jurisdictional issue. We have determined simply to decide the issue which in any case was briefed by both parties.

7 We quote here from the version of Fed. R. App. P. 3(c) in effect at the time the cities filed their notice of appeal.

validity of the amended notice of appeal depends upon the validity of the district court's grant of the cities' Rule 4(a)(5) motion to extend that time to file notice. [8] Rule 4(a)(5) provides:

> The district court, upon a showing of excusable neglect . . ., may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the [original prescribed period]. . . . No such extension shall exceed 30 days past [the prescribed period] or 10 days from the date of the entry of the order granting the [Rule 4(a)(5)] motion, whichever is later.

The district court found "excusable neglect" on the part of the cities. We review the district court's determination of "excusable neglect" with respect to a Rule 4(a)(5) motion only for an abuse of discretion. Gooch v. Skelly Oil Co., 493 F.2d 366, 368 (10th Cir.), cert. denied, 419 U.S. 997 (1974).

William argues that at best the record in this case supports only simple mistakes or failure to discover the well established Supreme Court precedent in Torres as reason for the cities' failure in the first instance to file effective notice of appeal. Williams contends that neither of these reasons is sufficient grounds for a finding of excusable neglect under Rule 4(a)(5) and that the district court

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8 It is appropriate here to note the cities' argument that we should not address Williams jurisdictional challenge to the appeal because Williams did not cross-appeal the district court's grant of the cities' Rule 4(a)(5) motion. We consider the question of jurisdiction nonetheless because the circumstances of this case fairly raise jurisdictional concerns, and, as always, "we have a duty to inquire into our own jurisdiction." McGeorge v. Continental Airlines, Inc., 871 F.2d 952, 953 (10th Cir. 1989); see also Gooch v. Skelly Oil Co., 493 F.2d 366 (10th Cir.) (considering propriety of district court's grant of Rule 4(a)(5) motion absent cross-appeal on the issue), cert. denied, 419 U.S. 997 (1974).

therefore abused its discretion in granting the Rule 4(a)(5) motion. We disagree.

In Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd Partnership, 113 S. Ct. 1489 (1993), the Supreme Court interpreted the meaning of "excusable neglect" in the context of the provision for late filings in bankruptcy law. The Court pointed out that "absent sufficient indication to the contrary, . . . Congress intend the words in its enactments to carry their ordinary, contemporary common meaning." Id. at 1495 (internal quotations omitted). It pointed out further that the common meaning of "neglect" is "'to give little attention or respect' to a matter, or . . .' to leave undone or unattended to especially] through carelessness.'" Id. at 1494-95 (emphasis omitted) (quoting Webster's Ninth New Collegiate Dictionary 791 (1983)). The Court concluded that in using the term "excusable neglect" in the bankruptcy code, "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id. at 1495. The Court directed further that in determining where neglect is "excusable" we must "take] account of all relevant circumstances surrounding the party's omission." Id. at 1498. The Court specifically pointed to four factors relevant to this calculation: "the danger of prejudice to [the nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id; see also In re Centric Corp., 901 F.2d 1514, 1517 (10th Cir.), cert. denied, 498 U.S. 852 (1990).

Because the Court's analysis of what constitutes "excusable neglect" in the bankruptcy context rested on the plain meaning of the terms, there is no reason that the meaning would be different in the context of Fed. R. App. P. 4(a)(5). See United States v. Hopper, 9 F.3d 257, 258-59 (2d Cir. 1993) (applying the Pioneer analysis of "excusable neglect" in the context of Fed. R. App. P 4(a)(5); see also Pioneer, 113 S. Ct. at 1496 (noting that "excusable neglect" in the context of the Fed. R. Civ. P. 6(b) carries the same commonly accepted meaning as discussed in the bankruptcy rules context such that it "may extend to inadvertent delays"); Romero v. Peterson, 930

F.2d 1502, 1505 (10th Cir. 1991) (holding that the presence of "excusable neglect" under Rule 4(a)(5) "should be determined on the basis of the common sense meaning of the two simple words") (internal quotations omitted). Thus we apply the Pioneer test for "excusable neglect" under Fed. R. App. P. 4(a)(5). 9 This is not to say that the test for excusable neglect is not a strict one. It is merely to say that, "[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' . . . is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." Pioneer, 113 S. Ct. at 1496 (footnotes omitted).

Focusing on the four factors outlined in Pioneer, we cannot say that the district court abused its discretion in finding excusable neglect. Williams focuses on factor three of the Pioneer analysis, pointing out that avoidance of the delay in filing the notice of appeal seems to have been within the reasonable control of the cities. 10 It is true that fault in the delay remains a very important factor -- perhaps the most important single factor -- in determining whether neglect is excusable, see United States v. Andrews, 790 F.2d 803, 806 (10th Cir. 1986) (finding excusable neglect where filing delay occurred because defendant was seriously ill, heavily medicated, and not

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9 The Court in Pioneer also found it relevant to determining the meaning of "excusable neglect" that a flexible understanding of the phrase "accords with the policies underlying Chapter 11 and the bankruptcy rules." Pioneer, 113 S. Ct. at 1495. We see nothing in the policies underlying the Federal Rules of Appellate Procedure which would lead us to a different conclusion as to the meaning of the phrase. See Torres, 487 U.S. at 316 (confirming that "the requirements of the rules of procedure should be liberally construed") (citing Foman v. Davis, 371 U.S. (1962)).

10 It appears that the cities simply mistakenly captioned their first notice of appeal "City of Chanute, Kansas, et al. " rather than naming all plaintiff cities.

represented by counsel), cert. denied, 481 U.S., 1018 (1987); United States v. Twomey, 845 F.2d 1132, 1134 (1st Cir. 1988) (finding excusable neglect where filing delay resulted from actions of postal service or court personnel), and that therefore this case is an arguable one. However, under the entire circumstances of the case and looking to the other three Pioneer factors, the district court acted within its discretion. We see no danger of prejudice to Williams from the delay. The amended notice of appeal was filed only 31 days after the end of the period prescribed for notice of appeal in Fed. R. App. P. 4(a)(1), a very short time in the context of a protracted litigation battle during which the parties have been well aware of each others' identifies. In addition, there is no evidence that the cities acted in other than good faith. We therefore affirm the district court's grant of the cities' Rule 4(a)(5) motion for extension of time to file notice of appeal. The cities' second notice of appeal is effective and all of the city plaintiffs are properly before us.

III. Aware of Attorneys' Fees

The cities argue that the district court erred in denying their motion for attorneys' fees under § 16 of the Clayton Act, 15 U.S.C. § 26 (we refer to this section as "§ 16" in the balance of this opinion), which provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . . and upon the execution of a proper bond against damages f or an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . . In any action under this section in which the plaintiff substantially

> prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

The cities contend that they have "substantially prevailed" so as to merit attorneys' fees under § 16. They cite two bases for this contention. First, they point to the preliminary injunction issued against Williams by the district court. See Chanute I. Second, they cite their stipulation agreement with Williams granting them certain rights. We find that the cities have not "substantially prevailed" and therefore are not entitled to attorneys' fees under § 16.

A. Applicability of Civil Rights Statute Framework for Award of Attorneys' Fees

Most of the case law on attorneys' fee awards to prevailing parties comes from the civil rights context under 42 U.S.C. § 1988, which provides that "[i]n any action or proceeding to enforce a provision of [enumerated civil rights statutes], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This language is very similar, though not identical, to that in § 16 of the Clayton Act (providing for attorneys' fees for "prevailing parties" rather than for a party who "substantially prevails" under § 16). The interpretive framework that has developed around § 1988 illustrates that § 1988 itself effectively entails a "substantially" prevailing party test as is expressly provided for in § 16. See subsection B infra outlining § 1988 fee award framework; see also Maher v. Gagne, 448 U.S. 122, 127 (1980) (approving district court decision which awarded attorneys' fees on the grounds that the plaintiff had received "substantially" the relief sought through a consent decree). Other courts that have considered fee awards under § 16 have done so using the § 1988 analytical framework. See, e.g. Royal Crown Cola Co. v. Coca-Cola Co., 887 F.2d 1480, 1485 (11th Cir. 1989), cert. denied, 497 U.S. 1011 (1990); Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744, 746-47 (9th Cir.), cert. denied, 469 U.S. 1072 (1984); Grumman Corp. v. LTV Corp., 533 F. Supp. 1385, 1387-88 (E.D.N.Y. 1982). We accept the reasoning of these cases and apply the § 1088 framework to this case.

B. Application of Attorneys' Fee Award Framework

Under 42 U.S.C. § 1988, and by analogy § 16 of the Clayton Act, there are two situations in which ar party is deemed to have sufficiently "prevailed" to qualify for an attorneys' fee award. First, a party must be awarded attorneys' fees where it has received "at least some relief on the merits of [its] claim" by judicial determination. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 109 S. Ct. 1486, 1493 (1989). Such relief can under certain circumstances include the grant of a preliminary injunction. See Dahlem v. Board of Educ., 901 F.2d 1508, 1511-1514 (10th Cir. 1990) (finding a preliminary injunction was sufficient relief on the merits to warrant attorneys' fee award under § 1988 where suit was subsequently mooted by passage of time before appeal of the injunction and before full adjudication on the merits). The cities argue, based on our decision in Dahlem, that the district court's grant of a preliminary injunction in Chanute I entitles them to attorneys' fees as prevailing parties in this case.

This argument misses the mark. First, unlike Dahlem where the injunction action was mooted "through no acquiescence by the defendant, while the order was on appeal, " 901 F.2d at 1512, here the injunction action was dismissed because a stipulation agreement was reached. Thus, the case is more appropriately analyzed under the second, "catalyst test" for attorneys fee awards (see below). Further, and most importantly, in Dahlem, because the plaintiff's claim was mooted before appeal of the preliminary injunction or full adjudication, the preliminary injunction represented the final word from the courts on the merit of the case. Here, by contrast, there was an eventual full adjudication on the merits resulting in a rejection of all of the cities' antitrust allegations. See Chanute IV (upholding the district court's dismissal of all claims). 11 The substantive determinations underlying the grant of the preliminary injunction were therefore overturned.

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11 Though the disposition on the merits in Chanute II, Chanute III, and Chanute IV directly concerned only the cities' action for damages, the rejection of the legal bases of the claims applies equally to any action for injunctive relief.

The Supreme Court's analysis in Hewitt v. Helms, 482 U.S. 755 (1987), is relevant here. In Hewitt, the Third Circuit ruled that plaintiffs constitutional rights had been violated, but remanded the case for qualified immunity analysis. 712 F.2d 48 (3d Cir. 1983). Subsequently, the district court held and the Third Circuit affirmed that qualified immunity shielded the defendants, thereby rejecting the plaintiff's claims on the merits. 745 F.2d 46 (3d Cir. 1984). In holding that the plaintiff was not entitled to attorneys' fees based on the Third Circuit's earlier, favorable statement on the law, the Supreme Court said: "We conclude that a favorable judicial statement of law in the course of litigation that [in the end] results in judgment against the plaintiff does not suffice to render him a 'prevailing party.' Any other result strains both the statutory language and common sense." Id. at 763. Though admittedly a party may receive more tangible short term benefits from a preliminary injunction than from a declaratory statement of the law that has no effect due to qualified immunity, allowing attorneys' fees for a preliminary injunction where the bases for a plaintiff's claims are ultimately rejected where the basis for a plaintiff's claims are ultimately rejected similarly "strains both the statutory language [here of § 16] and common sense." the cities did not receive a judicial determination on the merits warranting the award of attorneys' fees.

A party may also be deemed to have prevailed sufficiently to warrant the award of attorneys' fees under a two part "catalyst test." Under this test a plaintiff must have been a "significant catalyst" causing a defendant to change position, and the defendant's change in position must have been required under law. See Supre v. Ricketts, 792 F.2d 958, 962 (10th Cir. 1986); I&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1474-75 (10th Cir. 1985); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) (first establishing the catalyst test).

The cities argue that they are entitled to attorneys' fees under the catalyst test because their litigation caused Williams to enter into a stipulation agreement granting rights to the cities that they otherwise would not have had. Williams disputes these claims. Because the first part of the catalyst test involves primarily factual determinations (largely related to causation), we review the district court's findings under this part only for clear error. Supra, 792 F.2d at 962.

However, we find it necessary to address part one of the test in this case because the cities fail to satisfy part two. Part two of the catalyst test involves questions of law which we review de novo. Id.

The cities fail part two of the catalyst test largely on the same basis that we found them to have failed to obtain a sufficient judicial determination on the merits in part one above. The typical situation in which attorneys' fees are available under the catalyst test occurs where a defendant changes position in response to a suit or the parties reach a settlement agreement resulting in a dismissal of the suit with no further court action. See, e.g., Maher (upholding award of attorneys' fees under catalyst test where case was dismissed due to a settlement agreement); Luethje v. Peavine Sch. Dist., 872 F.2d 352 (10th Cir. 1989) (upholding attorneys' fees award under the catalyst test where employee brought § 1983 action for injunction against school problems and school district subsequently dropped the policy before adjudication). In such cases, under the second prong of the catalyst test we must determine whether the defendant's change in possession in response to the suit was required under law. See, e.g., Supre, 792 F.2d at 962-63 (undertaking analysis determining that defendant's conduct that mooted the suite was not legally required so as to warrant attorneys' fee award).

The case before us is unusual because we have a determination on the legal merits of the cities' claims [12] despite the fact that the parties reached a stipulation agreement resulting in the dismissal of the cities' request for injunctive relief. This makes our task much easier. In Chanute IV we found that the cities' antitrust allegations were without merit. Thus, any change in position by Williams in response to these claims was not required under the antitrust laws upon which the claims were based. We will not reward the cities for any benefits

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12 Again, it makes little difference that our decision in Chanute IV specifically regarded the cities' action for damages and not for injunctive relief. The underlying legal basis for the cities' request for both remedies was the same.

they achieved (if any) through this litigation where their antitrust allegations were without merit. 13

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13 The cities point especially to the Ninth Circuit's decision in Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744 (9th Cir. 1984) (Southwest Marine I), as precedent for the award of attorneys' fees in this case. In Southwest Marine I, the defendants changed position by agreement with the plaintiff, presumably in response to the plaintiff's antitrust suit. After a subsequent trial on the merits of the plaintiff's damages claim and a jury verdict in the plaintiff's favor, the district court entered judgment n.o.v. for the defendants. On appeal, the Ninth Circuit found that, absent further evidence, the plaintiff should prevail on liability. Id. at 747. It reversed and remanded the case for determination of some residual evidentiary questions with regard to liability and then for determination of the amount of damages. Id. The court found further that an attorneys' fee award under § 16 was appropriate based on the defendants' earlier change in position "whether or not plaintiff ultimately prevails on damages on remand." Id. In fact, on remand the plaintiff ultimately lost on liability, Southwest Marine, Inc. v. Campbell Indus., 616 F. Supp. 253 (S.D. Cal. 1985) (Southwest Marine II), yet the Ninth Circuit affirmed its statement regarding plaintiff's entitlement to attorneys' fees, Southwest Marine, Inc. v. Campbell Indus., 796 F.2d 191 (9th Cir. 1986) (Southwest Marine III). It in this language and outcome which the cities focus on to support their motion for attorneys' fees here.

On closer examination of the Southwest Marine litigation, however, we do not find it to support the cities' position. In Southwest Marine I, the Ninth Circuit essentially found the plaintiff's antitrust claims to have legal merit. On remand, the district court dismissed the claims only due to an

(Footnote continued on Following Page)

interim change in the law. See Southwest Marine II. As the

IV. CONCLUSION

We find that the district court did not abuse its discretion in granting the cities extended time to file an amended notice of appeal and therefore that all eight of the city plaintiffs are properly before us in this appeal. Further, we find that the district court properly denied the cities' motion for attorneys' fees.

AFFIRMED.

Ninth Circuit subsequently noted in affirming the defendants' liability for attorneys' fees: "Southwest Marine's decision to institute litigation was neither frivolous nor unreasonable. To the contrary, its legal position at the time it filed its complaint, as well as at the time it accomplished the practical result that underlay our attorneys' fees determination, was supported by the weight of legal authority." Southwest Marine III, 796 F.2d at 292. This is not the situation we face here. Our rejection of the substance of the cities' antitrust claims amounts to a statement that they lacked merit from the inception of the suit, regardless of any preliminary determination by the district court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; CITY OF OSAGE, KANSAS,	)	
Plaintiffs-Appellants,	)	No. 93-3101 93-3125
v.	)	
WILLIAMS NATURAL GAS COMPANY,	)	
Defendant-Appellee.	)	

ORDER
Entered September 8, 1994

Before SEYMOUR, Chief Judge, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, Circuit Judges, and ROSZKOWSKI,* District Judge.

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*Honorable Stanley J. Roszkowski, Senior District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER,
Chief Deputy Clerk
By JIM POWERS,
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; CITY OF OSAGE, KANSAS,	)	
Plaintiffs-Appellees,	)	No. 88-1225
vs.	)	(D.Ks. 87-1463-K)
WILLIAMS NATURAL GAS COMPANY,	)	
Defendant-Appellant,	)	
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,	)	
Amicus Curiae.	)	

July 26, 1988
Before Honorable James K. Logan, Honorable Deanell R. Tacha and Honorable Wade Brorby, Circuit Judges

This matter comes on for consideration of a Stipulation filed by the parties.

The captioned appeal was scheduled for oral argument at the July 1988 Session.

Upon consideration whereof, the Stipulation is approved. This appeal is dismissed.

The February 5, 1988 Order of the district court granting Plaintiffs' motion for preliminary injunction is vacated.

The March 28, 1988 Order of this Court staying the preliminary injunction is vacated.

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CITY OF CHANUTE, KANSAS, *et al.*,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
vs.	)	No. 88-1225
	)	
WILLIAMS NATURAL GAS COMPANY,	)	
	)	
Defendant-Appellant.	)	

Appeal from Preliminary Injunction issued by the United States District Court for the District of Kansas (Kelly, J.)

STIPULATION

WHEREAS, the U.S. District Court for Kansas entered a preliminary injunction on February 5, 1988, directing Williams Natural Gas Company ("WNG") to open access to its pipeline to the eight plaintiff Cities for the transport of third-party gas (Case No. 87-1463-K);

WHEREAS, WNG appealed the injunction to the U.S. Court of Appeals for the Tenth Circuit and the said Court stayed the injunction pending appeal (Case No. 88-1224);

WHEREAS, on July 20, 1988, WNG accepted a blanket open-access certificate under section 7 of the Natural Gas Act to implement the FERC's approval of WNG's Revised Stipulation and Agreement;

WHEREAS, WNG will provide, and the Cities wish to obtain from WNG, firm and/or interruptible transportation service for 100% of their natural gas requirements, in lieu of full requirements or other sales service;

NOW THEREFORE, WNG and the Cities agree as follows:

1. This Stipulation shall be treated as WNG's commitment to provide the Cities with firm and/or interruptible transportation service in accordance with WNG's FERC tariff;

2. WNG will dismiss its appeal;

3. The Cities will withdraw their motion for preliminary injunction;

4. WNG and the Cities hereby agree mutually to terminate all sales contracts between them that have not already expired, and the Cities agree not to oppose abandonment of sales service in proceedings to be initiated by WNG before the FERC;

5. The Cities shall be subject to only those charges and procedures for interruptible and/or firm transportation services they receive as are contained in the rates and procedures in WNG's transportation tariffs on file with the FERC from time-to-time; and

6. . . . The Cities shall, by July 29, 1988, and thereafter from time-to-time, submit to WNG appropriate requests for firm and/or interruptible transportation service, and thereafter the Cities may submit changes in such service or additional receipt and/or delivery points. Upon receipt of the Cities' service requests, WNG shall submit to the Cities or their agent appropriate transportation contract(s) in accordance with WNG's FERC tariff. The Cities may assign interruptible transportation to an agent for the purpose of pooling.

IN WITNESS WHEREOF, counsel of record for the parties have executed this Stipulation this 22nd day of July, 1988.

Charles F. Wheatley, Jr.
Counsel for the Cities

John T. Schmidt
Counsel for WNG